

Bush vs. Obama Detainee Policy Post-9/11

An Assessment

Leonard Cutler

THE RECORD of the Bush administration in the aftermath of 9/11 includes the overthrow of the Taliban regime in Afghanistan, the disruption of al-Qaeda's power infrastructure, and the capture or killing of some of the terrorist organization's worst actors. However, on balance, it also included a violation of international as well as domestic legal standards related to torture, subjecting alleged terrorist prisoners to arbitrary indefinite detention and inhumane and degrading treatment; creating secret CIA-run prisons abroad; using unlawful rendition; and employing extensive international and domestic warrantless surveillance without court supervision. As a result, the Bush administration adversely affected our relationship with other nation states and defeated the goal of reducing anti-American sentiment in the global arena.¹

After a brief review of detainee policies in the Bush administration, this article will focus on Obama administration policies and to what extent they have continued or reversed Bush-era policies. Specifically, attention will be given to the following issue areas: closure of the Guantanamo Bay detention facility, the Military Commissions Acts of 2006 and 2007, and prolonged detention of suspected terrorists.

What will be evidenced is that several Obama administration detainee policies are closer to Bush administration policies, as modified and impacted by Congress and the Court, than was originally anticipated when this president's term began in January 2009. This is due to policies and decisions Obama inherited from his predecessor which were not readily reversible, in part because they were institutional executive branch policies that preceded either president, and in part due to the learning process that

Dr. Leonard Cutler is professor of public law in the department of political science at Siena College, Loudonville, New York. His areas of expertise include criminal law and procedure, constitutional law, and international law. He has authored several books, most recently, *The Rule of Law and Law of War and Developments in National Security Policy of the United States Post 9/11*. Dr. Cutler has provided testimony to the Judiciary Committee of the US Senate on "Restoring the Rule of Law" (2008), and the President's Interagency Task Force on Detainee Disposition (2009).

Report Documentation Page			<i>Form Approved OMB No. 0704-0188</i>	
<p>Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</p>				
1. REPORT DATE 2010	2. REPORT TYPE	3. DATES COVERED 00-00-2010 to 00-00-2010		
4. TITLE AND SUBTITLE Bush vs. Obama Detainee Policy Post-9/11: An Assessment		5a. CONTRACT NUMBER		
		5b. GRANT NUMBER		
		5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S)		5d. PROJECT NUMBER		
		5e. TASK NUMBER		
		5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) AIr University,Strategic Studies Quarterly,155 N. Twining Street, Building 693,Maxwell AFB,AL,36112-6026		8. PERFORMING ORGANIZATION REPORT NUMBER		
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)		10. SPONSOR/MONITOR'S ACRONYM(S)		
		11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited				
13. SUPPLEMENTARY NOTES				
14. ABSTRACT				
15. SUBJECT TERMS				
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 25
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified		

President Obama has undergone transitioning from a member of the US Senate, to presidential candidate, to chief executive and commander in chief of the United States.

That said, there are substantial and notable distinctions between the Bush and Obama administrations' approaches to detainee policy that could have significant impact on national security policy for the foreseeable future. Most importantly is President Obama's apparent commitment to consult with Congress on detainee policy issues as well as his determination to have his administration function in a more transparent manner than his predecessor. From a practical perspective this makes sense, since the president needs the support of Congress, the Court, and the public to effectively undertake the war against terrorists. The president must fulfill that commitment not only in word but more importantly in action.

Of principal concern with both the Bush and Obama administrations' detainee policy post-9/11 is their position regarding indefinite or prolonged detention. It will be demonstrated that there is no substantive difference with respect to their views that this policy is essential to protecting and preserving the national security interests of the United States, and that there does not exist a need for Congress to address this matter given the implicit authority provided to the president in the *Authorization for the Use of Military Force (AUMF)*. Regardless of whether or not such power is inferred in the *AUMF*, it is a fatally flawed approach that does not properly respect constitutional as well as international law considerations and lacks legitimacy and justification with respect to pursuing effective counterterrorism policy.

Prescription for Policy

In the immediate aftermath of the horrific devastation of 11 September 2001, Pres. George W. Bush addressed a joint session of the United States Congress in which he called for retaliatory action to be taken against the terrorist perpetrators who committed these unprecedented attacks on American soil.² The administration determined that the loss of nearly three thousand lives could be directly attributed to al-Qaeda terrorists led by Osama bin Laden, who were aided and abetted by the Taliban government of Afghanistan.

The Congress, for its part, passed the *Authorization for the Use of Military Force*³, which enabled the president to take all necessary and appropriate

measures to capture and punish those individuals who were in any way involved in the assault. Among other things, it authorized the president:

Under the Constitution to take action to deter and prevent acts of international terrorism against the United States . . . [and] to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁴

President Bush issued a military order which created military commissions and a process and procedures for dealing with the detainees who were captured and taken into custody after the United States invaded Afghanistan as part of Operation Enduring Freedom in October 2001.⁵ John Bellinger, former legal advisor to the National Security Council and later principal legal advisor to the secretary of state, remarked in a 2008 interview that it was a “small group of administration lawyers who drafted the president’s military order establishing the military commissions, without the knowledge of the rest of the government, including the national security advisor, secretary of state or even the CIA director.”⁶ Several hundred captured prisoners, who were under the jurisdiction of the US military, were transferred to Guantanamo Bay, Cuba, by directive from Secretary of Defense Donald Rumsfeld for extended interrogation by government officials and determination as to whether they could be held indefinitely as designated unlawful enemy combatants.

The administration had a clear strategy as to why it selected the Guantanamo Bay site to keep the alleged terrorists who were apprehended by the government in undertaking its war on terror. Since the earliest part of the twentieth century when the United States acquired jurisdictional treaty rights to Guantanamo Bay,⁷ the position taken by successive presidential administrations was that aliens held in federal custody lacked both statutory and constitutional habeas corpus rights because the nation of Cuba maintained territorial sovereignty over that island.⁸ For the Bush administration this interpretation meant that none of the 500-plus detainees were entitled access to the US court system to determine why they were being held indefinitely without charge, and furthermore, that the US government had no affirmative obligation to provide traditional procedural and substantive due process rights to the detained prisoners.⁹

Additionally, since al-Qaeda, as a terrorist organization, did not observe the rule of law and the generally accepted principles of the laws of war, the Bush administration concluded that US treaty requirements of the Geneva conventions related to treatment and protection of prisoners of war did not apply.¹⁰ The president therefore issued an executive order denying any legal protections in the conventions to either the al-Qaeda detainees or the captured Taliban prisoners who were involved in aiding and abetting the enemy. The order generated considerable debate, pitting the State Department against the Justice Department, the Department of Defense, and the Office of the Vice President.

Lawrence Wilkinson, senior aide and chief of staff to Secretary of State Colin Powell, observed that the executive order and legal memorandum supporting it were crafted by David Addington, chief of staff to Vice President Cheney, and was “blessed by the Office of Legal Counsel (OLC), and then given to Cheney, and Cheney gave it to the President, and the President signed it.”¹¹ As a result of this determination, for several years there was created a giant legal black hole of minimal protections, minimal law, and questionable legitimacy for the administration’s actions at Guantanamo.

Additionally, in August of 2002, Justice Department lawyers Jay Bybee and John Yoo prepared a secret memorandum which set out the limits on coercive interrogation by US officials at Guantanamo. The memo abandons international standards and redefines the meaningful threshold limits for the application of torture techniques to be employed by the government. William Haynes, legal counsel for the Department of Defense, prepared a memo for Secretary Rumsfeld’s approval, which permitted the use of aggressive interrogation techniques by the military at Guantanamo that included:

- prolonged solitary confinement, including isolation in total darkness;
- deliberate exposure to extremes of heat and cold;
- threats of attack from unmuzzled dogs;
- forced nakedness;
- short shackling in painful stress positions for extended periods;
- denial of food and water; and
- repeated body cavity searches.

Although these memoranda were eventually rescinded after serious objections and backlash from within the administration, the policies and

practices continued to be influenced by the philosophy developed by the Bybee-Yoo strategy.¹²

When President Bush signed into law the Detainee Treatment Act (DTA),¹³ which was enacted by Congress in 2005 to prohibit the inhumane treatment of prisoners, the president appended a “signing statement” laying out his own interpretation and indicated that he was not bound by the law in his enforcement of the provisions,¹⁴ and Congress in 2006, with the passage of the Military Commissions Act (MCA),¹⁵ authorized the Central Intelligence Agency (CIA) to continue to use harsher interrogation methods than those permitted to the military, which was governed by the Army Field Manual.¹⁶ In 2008, despite the fact that Congress passed legislation that would have forced the CIA to comply with the humane treatment standards in the Army Field Manual, President Bush vetoed that law, insisting that the CIA must be allowed to operate by its own rules.

In interviews granted in the last month of the Bush administration, Vice President Cheney reaffirmed the position that “you can have a robust interrogation program with respect to high-value detainees.”¹⁷ He sharply distinguished between the

different elements of . . . or issues that are often at times conflicted and all joined together and balled up. People take Guantanamo and Abu Ghraib and interrogation of high-value detainees and . . . characterize it as torture policy. . . . [S]omething like Abu Ghraib was not policy. It was, in fact, uncovered and then exposed by the military. Guantanamo, I believe, is a first-rate facility. It's one we absolutely needed and found essential. If you're going to evaluate how it's functioned, the policy that we adhere to at Guantanamo basically is the US Army Field Manual.¹⁸

With respect to high-value detainees and enhanced interrogation techniques employed by the CIA under its jurisdiction, the vice president said that such procedures “applied only to a few people who were individuals like Khalid Sheikh Mohammed, the mastermind of 9/11, who we believe possessed significant intelligence about the enemy, about al-Qaeda, about their future plans, about how they were organized and trained and equipped, and where they operated.”¹⁹

He added that fighting the war on terror demanded that our nation acquire good intelligence on the enemy. There were a total of

about 33 who were subjected to enhanced interrogations, only three of those were subjected to waterboarding—Khalid Sheikh Mohammed, Abu Zubaydah, and a third, al Noshiri. Those three guys, and I don't believe it was torture. We spent a great deal of time and effort getting legal advice, legal opinion out of the Office

of Legal Counsel, from the Department of Defense, as to where the red lines were out there in terms of this you can do, this you can't do. The CIA handled itself very appropriately. The legal opinions were sound, the techniques were reasonable in terms of what they were asking to be able to do. And I think it produced the desired result. I think it's directly responsible for the fact that we've been able to avoid or defeat further attacks against the homeland for seven and a half years.²⁰

Closing Guantanamo Bay Detention Facility

Even prior to his inaugural, President-elect Barack Obama said in an interview that he planned to issue an executive order during his first week in office closing the Guantanamo Bay detention facility. However, he added that:

it is more difficult than a lot of people realize and we are going to get it done but part of the challenge that you have is that you have a bunch of folks that have been detained, many of whom may have been very dangerous who have not been put on trial. . . . [C]losing Guantanamo within the first 100 days is a challenge. I think it's going to take some time and our legal teams are working in consultation with our national security apparatus as we speak to help design exactly what we need to do. We are going to close Guantanamo and we are going to make sure that the procedures we set up are ones that abide by our Constitution.²¹

The Bush administration publicly advocated the closure of Guantanamo as early as 2006. However, as is demonstrated from the remarks of Secretary of State Condoleezza Rice below, there were recognizable concerns to be addressed:

The United States doesn't desire to keep Guantanamo in being any longer than it's needed because we don't want to be the world's jailer. That's not the United States because it's not U.S. policy.

But we have to recognize that Guantanamo is there for a reason. It's there because we captured people on battlefields, particularly in Afghanistan but sometimes, frankly, on the battlefields of our own democratic societies, who were either plotting or planning or actively engaged in terrorist activities.

. . . there are some people who cannot either be safely released to their countries . . . and there are people for whom the value of the information that they have is still relevant to the fight against terror.

But I would just ask: What would be the alternative? If the alternative is to release people onto the streets so that they can do harm again, that we're not going to do. If the alternative is to try people, that we want to do. And we are looking for the means to do that, including the fact that the fate of military commissions is being reviewed by the U.S. Supreme Court.

. . . I want to assure you, the reasons for Guantanamo have to do with the necessities of keeping very dangerous people off the streets.²²

In his second day in office, President Obama issued an executive order directing that the Guantanamo Bay military prison “shall be closed as soon as practicable, and no later than 1 year from the date of the order.”²³ The president recognized that simply closing the facility would not appropriately serve the interests of justice. The new administration had to determine the appropriate disposition of the remaining detainees who were held there, some for a period for more than six years. The president stressed that the closure would be consistent with national security and foreign policy interests as well as international concerns.

The order called for an immediate review of all the detainees held at the naval base to determine whether they should be transferred, released, or for that matter prosecuted. Early indications from the European Union (EU) were encouraging in that several EU members were likely to accept some former prisoners who were no longer designated enemy combatants. Many of the countries said that their acceptance would be handled on a case-by-case basis.²⁴

The order further stipulated that the cases of individuals detained at Guantanamo determined not to be approved for release or transfer would be evaluated to determine whether they should be prosecuted for offenses they may have committed, including whether it was feasible to prosecute them in an Article III court established pursuant to the US Constitution.²⁵ The review required identification and consideration of legal, logistical, and security issues related to the transfer and potential prosecution of the detainees to facilities in the United States.

Approximately 240 detainees remained at Guantanamo when President Obama issued his executive order calling for the closure of the prison facility. Of that group an estimated 150 individuals were eligible for release or transfer to a foreign home or host nation. The balance was subject to determinations as to whether and where they were to be prosecuted. About 50 detainees from such countries as China, Algeria, Tunisia, and Libya were potential targets of torture or severe physical and/or mental abuse if they were returned home. Albania, one of the few Muslim states in Europe, accepted five of the Chinese Muslim Uighurs on humanitarian grounds. If they were returned to their home state, they would have been executed for committing alleged treason against the Chinese government.²⁶

On 21 May 2009, President Obama delivered a major national security speech at the National Archives, which focused on closing the Guantanamo Bay facility and what to do about the detainees still held there. He stated that some would be tried in federal courts for violations of federal law; a second category would be tried by reconstituted military commissions for violations of the laws of war; a third category had been ordered released by the courts; a fourth category included those who could be safely transferred to other nations; and the fifth category were those who could not be tried in the federal courts or by military commission but were believed too dangerous for release or transfer. This small group would be subject to what the president called prolonged detention accompanied by procedural safeguards and oversight by both the judicial and legislative branches of government.

About five weeks prior to the originally anticipated closing date, President Obama ordered the federal government to acquire an Illinois prison to house certain detainees held at Guantanamo. The Thomson Correctional Center, a near-vacant, super-maximum-security prison located in northwestern Illinois, was selected by the president and the Department of Defense to house a limited number of prisoners.

The proposal enjoyed strong support from Illinois governor Patrick Quinn and Senator Richard Durbin, who praised the idea as potentially creating 3,000 new jobs for the state. Opponents to the plan, including Republicans in the House and the Senate, vowed to prevent the necessary appropriation from being enacted into law. Realistically, to retrofit the existing facility—including construction and installation of new fencing, towers, cameras, and other security measures—would require 8–10 months at an estimated cost of \$200 million.

The administration was hopeful that Congress would approve the requested funding as part of its military spending bill for the 2010 fiscal year, but Democratic leaders refused to do so. Congress was to address a supplemental appropriations bill for the Afghanistan war in the late spring of 2010, and it was uncertain whether a rider would be included to address the Thomson facility. Due to the 2010 midterm elections and the volatility concerning moving the detainees to American soil, marginal Democrats, as well as the Republicans—who were hopeful of picking up seats in the Congress—were expected to offer considerable hostility to this proposal. Congressional resistance to the administration's request for additional funding and failure to approve the transfer of the remaining

detainees from Guantanamo to American soil prevented the president's desired timetable for closing the prison facility from being accomplished as originally anticipated in his executive order.

The Military Commissions Acts of 2006 and 2009

In response to the US Supreme Court's decision in *Hamdan v. Rumsfeld*,²⁷ which struck down the president's order establishing military commissions, Congress enacted the Military Commissions Act (MCA) of 2006.²⁸ Its intent was to modify the procedures and processes the Court had determined to be deficient, but the new commissions created by the statute lacked substantive evidentiary requirements as well as fair trial guarantees. They were subject to considerable criticism and challenge by the legal community, which led to yet another Supreme Court decision, *Boumediene v. Bush*,²⁹ in 2008. In that ruling the Court determined that detainees held at Guantanamo Bay were entitled to the constitutional protection of petition for habeas corpus relief despite the fact that they were not nationals of the United States and despite the fact that the MCA specifically denied them such relief. The ruling was narrow, but it led to several additional challenges by detainees held at other military sites who were seeking a determination that the *Boumediene* decision applied to them and that the entire law was unconstitutional and, therefore, could not be enforced.³⁰

Military commissions created post-9/11 produced only three case decisions—two by trial and one by a plea deal.³¹ Their seven-year track record with respect to efficiency, effectiveness, and most importantly, equity, was questionable at best.

Hours after taking office on 20 January 2009, President Obama ordered prosecutors before the military commission tribunals to seek a 120-day delay in all pending cases, and Secretary of Defense Robert Gates ordered a suspension of all active military commission processes. The president intended to determine what forum was most appropriate for future prosecution of charged prisoners. At that point it appeared the continuation of the military commission process as developed in the MCA was in serious doubt.

There were several flaws in the MCA, which had to be addressed once the Obama administration decided to reinstitute the military commission process. The MCA made the standard on interrogation treatment retroactive to 1997 to exempt CIA and military personnel from prosecution for past treatment under standards the administration considered vague.³²

The MCA differentiated between statements obtained before 30 December 2005, when the Detainee Treatment Act came into force, and statements obtained after that date. For the latter, a military judge had to find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment as defined and prohibited in the DTA.³³

Hearsay evidence, inadmissible in courts-martial or ordinary US courts under the Federal Rules of Evidence, may be admitted in trial by the military commission unless the party opposing its use, having been given a fair opportunity to challenge the evidence, “demonstrates that the evidence is unreliable or lacking in probative value.”³⁴ The language also provided that classified evidence could be used against charged detainees in military commission trials, but that a summary of that evidence must be provided to defendants.³⁵ Any classified information “shall be protected and is privileged from disclosure if such disclosure would be detrimental to the national security.”³⁶ This rule applied to “all stages of the proceedings of military commissions, including the discovery phase.”³⁷ Of overriding concern was the applicability of these provisions even to any classified evidence that “reasonably tends to exculpate the accused.”³⁸ Therefore, defendants could very well be denied access to some or all governmental evidence that would serve to prove their innocence if such evidence was classified and the government, with the approval of a military judge, considered it impracticable to provide a summary version.

The right to a lawyer of one’s choice was restricted under the MCA because the defendants must bear the cost unless lawyers offered their services pro bono. The civilian lawyer must be a US citizen and have passed a highly restrictive security clearance of “secret or higher.”³⁹ Even if defendants retained a US civilian lawyer with the necessary security clearance, they would still be represented by a US military lawyer as associate counsel, even if that goes against their wishes.⁴⁰

The MCA prohibited the admission of any statement obtained by the use of torture (except as evidence against the person accused of torture).⁴¹ It is important to note, however, that the United States defined torture narrowly. The *Manual for Military Commissions* (MMC) identified torture as “An act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within the actor’s custody or physical control.”

Severe mental pain or suffering is defined as the prolonged mental harm caused by or resulting from:

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁴²

The military commission system as constituted under the MCA left to the military and executive authorities the determination as to what constituted torture and other ill treatment and whether information produced from it could be introduced at trial. The MCA made no provision that guaranteed the right to a trial within a reasonable time. Indeed, the act expressly stated that any of the rules to a speedy trial in courts-martial proceedings do not apply to military commissions.⁴³

Under the MCA, anyone convicted by a military commission may have the findings and sentence reviewed by the convening authority.⁴⁴ In addition, the secretary of defense “shall establish” a Court of Military Commission Review (CMCR) made up of panels of not less than three appellate military judges.⁴⁵ The secretary of defense appoints the judges, including the chief judge, to the court, and it resides within the Office of the Secretary of Defense.⁴⁶

The CMCR acts only with respect to matters of law and not questions of fact.⁴⁷ The court may only grant relief if an error of law prejudiced a substantial trial right of the accused.⁴⁸ The MCA emphasized that the DTA’s limited right of appeal applied, adding that the District of Columbia (DC) Circuit Court of Appeals may not review the final judgment until the review by the convening authority and the CMCR had been exhausted or waived.⁴⁹ In addition, the MCA states that the US Supreme Court may review decisions of the DC Circuit Court of Appeals if it so decides.⁵⁰ Except for this limited right of appeal, the MCA was very specific in denying any other “court, justice, or judge to have jurisdiction to

hear or consider any claim or cause of action . . . relating to the prosecution, trial or judgment of a military commission . . . including challenges to the lawfulness of these procedures of military commissions.”⁵¹

On 15 May 2009, the Obama administration announced five rule changes to the military commission system as a first step toward achieving more meaningful reforms to the MCA. The rule changes “prohibited the admission of statements obtained through cruel, inhuman, and degrading treatment; provided detainees greater latitude as to choice of counsel; afforded basic protections for those defendants who refused to testify; reformed the use of hearsay by putting the burden on the party trying to use the statement; and made clear that military judges could determine their own jurisdiction.⁵²

In late June, the Senate Armed Services Committee (SASC) reported the FY-10 Defense Authorization Bill (S.7390) to the full Senate. S.7390 included §1031 that replaced the MCA with a new and improved military commissions system. Principal components of the administration’s reform were incorporated into the bill as well as several other necessary reforms. Noteworthy among the changes were the following:

- Whereas in the original MCA, the test for admission of testimony allegedly obtained through coercion was keyed to the passage of the DTA,⁵³ the new MCA applied the post-DTA test to all statements regardless of the date they were taken.
- The MCA and the Defense Authorization Bill allowed for the admission of hearsay evidence at trial, although the test in §1031 provided that the military judge may admit hearsay evidence after taking into account all of the circumstances surrounding the taking of the statement, the degree to which the statement was corroborated, and the indicia of reliability within the statement itself. After that, the test for admission provided that the judge may admit the evidence only if it is determined that (1) the statement was offered as evidence of a material fact, (2) the general proposer of the rule of evidence and the interests of justice were best served by the admission of the statement into evidence, and (3) either direct testimony of the witness was not available as a practical matter or the production of the witness would have an adverse impact on military or intelligence operations.⁵⁴
- The Defense Authorization Bill provided accused al-Qaeda terrorists with the same rights of access to classified information against them

as US service members subject to courts-martial. Section 1031 of the new MCA required that classified information be handled in accordance with rules applicable in trials by general courts-martial of the United States.

- The new MCA sought to provide the procedures and the rules of evidence applicable in trials by general courts-martial of the United States applicable in trials by military commission. The *UCMJ* and its provisions were not binding on military commissions in the MCA.⁵⁵
- The original MCA established a Court of Military Commission Review to serve as the appellate court for the military commissions trial forum. Further appeals were then authorized through the DC Circuit and the US Supreme Courts.⁵⁶ The new MCA vested the appellate path directly from the trial commission to the US Court of Appeals for the Armed Forces, which is the current appellate forum for *UCMJ* courts-martial.
- The new MCA defined cruel or inhuman treatment as subjecting a person in custody or under physical control to cruel or inhuman treatment that constitutes a grave breach to Common Article 3 of the Geneva conventions. The original MCA defined cruel or inhuman treatment as an act “intended to inflict severe or serious physical or mental pain or suffering, including serious physical abuse.”⁵⁷
- The principal purpose of the MCA was to create a system in which alien unlawful enemy combatants would be tried for violations of the law of war.⁵⁸ The new MCA changed the label to *unprivileged enemy belligerent* and defined this person as one who (1) engaged in hostilities against the United States or its coalition partners, or (2) purposefully and materially supported hostilities against the United States or its coalition partners.

When President Obama signed into law the National Defense Authorization Act (NDAA) on 28 October 2009, it essentially retained the provisions discussed above, which makes it a marked improvement over its predecessor. Most importantly, it excludes any statements obtained through torture, coercion, or cruel, inhuman, and degrading treatment; it permits defendants to attend all sessions, to have the right to cross-examine witnesses, and to call their own witnesses in their defense; it requires prosecutors to turn over any exculpatory evidence as well as any evidence that might

impeach the credibility of a government witness; it permits defendants the option of hiring their own civilian lawyers or relying on ones willing to work pro bono, and defense lawyers who have secret-level security clearances are entitled to examine classified information; and it allows defendants found guilty by a military commission to appeal their conviction to a three-judge military review panel and then to the US Court of Appeals for the DC circuit.

The new law is considerably better with respect to ensuring fairness for detainees and provides a far better structure to prosecute those whom the government is unable to try in Article III courts. Federal courts utilizing the *UCMJ* as the benchmark are the ideal solution but not necessarily the most practical in all cases. Military commissions have played a consistent role in our constitutional and historic tradition, and their use when properly authorized by Congress has been upheld by the US Supreme Court. Such commissions have been constitutionally recognized agencies for meeting urgent governmental responsibilities relating to the laws of war without Congress formally declaring war.⁵⁹

In a major policy reversal from the Bush administration, Attorney General Eric Holder in mid November 2009 announced that Khalid Shaikh Mohammed, the self-described mastermind of the 9/11 attacks, and four others accused in the plot would be tried in a Manhattan federal court. The decision by the Obama administration set the stage for one of the highest-profile, highest-security terrorism trials in American history. Mr. Holder said that he would instruct prosecutors to seek the death penalty for all five of the accused.

Six other Guantanamo detainees, including Abd al-Rahim al-Nashiri, the accused architect of al-Qaeda's bombing of the Navy destroyer USS *Cole* in Yemen in 2000, were to be tried before a military commission. The attorney general cited the fact that the *Cole* bombing was an attack on a military target to justify the military trial.

The Obama administration's decision to try Mohammed and his fellow terrorist suspects in civilian court provoked sharp criticism from Republican leaders in Congress, who expressed concerns about national security vulnerability. They insisted that military tribunals were the more secure and appropriate venue for trying the terrorist suspects, and that utilizing federal civilian courts would turn the entire process into a circus atmosphere. Mr. Obama, in an interview with NBC News, responded that any anger

at the civilian trial would disappear when Khalid Shaikh Mohammed is convicted and when the death penalty is applied.

Prolonged Detention of Suspected Terrorists

Post 9/11, the Bush administration's war on terror strategy involved indefinitely holding alleged enemy combatants in American military facilities, including the naval base at Guantanamo Bay and the air base at Bagram, Afghanistan. The intention was, under the laws of war, to hold them without charge and to employ "aggressive" interrogation techniques to gather valuable information that would be useful to our national security interests.

Since September 2004, the movement of prisoners to Guantanamo has virtually come to a halt, leaving Bagram as the preferred detention site. The population at Bagram has increased an estimated sixfold in the past four years, with approximately 600 detainees being held there. Virtually all of the Bagram suspects were captured on the battlefield, were being held in a war zone, and could pose a serious threat to the United States if released. This group is distinct from the remaining Guantanamo detainees who were not captured on the battlefield, nor were they being held in a war zone. What they share in common is the fact that they have been imprisoned for over six years without the legal process providing them any relief.

Because President Obama was committed to an expanded US role in combat operations against the Taliban in Afghanistan, the question arose early concerning how this administration would differ from the Bush administration in its policy of detention in Afghanistan. If President Obama moved away from the Bush administration's highly aggressive detention policies, how would this be reconciled with plans to increase the military surge in Afghanistan, which would most certainly lead to greater numbers of detainees taken into custody from the battlefield, and how would that fit within a counterinsurgency strategy in that nation? For example, in the spring of 2009 President Obama, dispatched an additional 21,000 Soldiers, Marines, and support personnel at the request of GEN David D. McKiernan, former top US commander in Afghanistan, to help stabilize that country, and in a speech at West Point in early December, the president announced his plan to send 30,000 more troops to Afghanistan while setting an 18-month flexible timetable for beginning to withdraw forces. The Pentagon acknowledged that Afghanistan had

become the military's top priority in the war against al-Qaeda and the Taliban supporters to which they are symbiotically linked.

Although President Obama did not express his views on the policy of indefinite detention, he did order a review of the detention of Ali Saleh Kahlah al-Marri, the only individual held in the United States by the DoD as an enemy combatant. Al-Marri, a citizen of Qatar lawfully residing at his home in Peoria, Illinois, was arrested by civilian authorities in 2001 and held without formal criminal charges at a naval brig in Charleston, South Carolina, for over seven years, five of them as a declared "enemy combatant." Since he was never formally charged with a crime, he could not be tried by the government, although US authorities asserted that the detainee conspired with al-Qaeda to engage in terrorist activities.

In July 2008, the US Court of Appeals for the Fourth Circuit upheld the president's authority to order al-Marri's detention. However, in December 2008, the Supreme Court granted a formal request challenging the Fourth Circuit's ruling.⁶⁰ In late February 2009, Justice Department prosecutors in the Obama administration brought formal criminal charges against al-Marri for material support of terrorism. Since the Supreme Court was scheduled to hear his case challenging his designation as an "enemy combatant" as illegal, the question arose as to whether the administration intended to proceed with the case or reverse its course and not defend the Bush administration's designation of al-Marri. Despite the position taken by the new administration, many legal observers, including this author, believed it was essential for the Court to rule on the issue. Unfortunately the Court refused to hear the case.

Al-Marri subsequently pled guilty to one count of conspiracy to provide material support to al-Qaeda, admitting that he agreed with others to provide resources in the form of personnel, including himself, to work under al-Qaeda's direction and control with the intent to further the terrorist activity or terrorism objectives of al-Qaeda. At sentencing, al-Marri faced up to 15 years' imprisonment, a \$250,000 fine, and a life term of supervised release, but he received a relatively light sentence of eight years from US District Judge Michael Mihm because of what the judge called the "very severe" conditions under which he was held.⁶¹

Several former federal law enforcement officials from the Department of Justice as well as military and counterterrorism experts have observed that pursuing a policy of indefinite detention is not only ineffective to fighting the war on terror, it is also contrary to rule of law, which is the

basis of the American constitutional system and its regard for fundamental due process rights.⁶² The prisoners who have been indefinitely detained at Bagram without any charges or access to lawyers are entitled to federal court review just as the detainees at Guantanamo were given such a right by the Supreme Court in its decision in *Boumediene*.⁶³ In an opinion written by Associate Justice Kennedy, the five-member majority agreed that §7 of the MCA of 2006, which denies federal courts jurisdiction to hear habeas corpus actions, is unconstitutional. However, the Court failed to determine whether the president has the legal authority to indefinitely detain prisoners held at Guantanamo or for that matter any military facility, including the Bagram air base in Afghanistan.⁶⁴

President Obama lacks such authority, particularly as it applies to those individuals who have been apprehended in nation states far removed from the Afghan battlefield who were not directly participating in hostilities and were subsequently brought to the theater of war for incarceration. The authority to indefinitely detain totally lacks any credibility when it is extended to persons who are seized outside of the theater of armed conflict, who are not directly participating in combat, but may be in their homes, at work, on a street, or in a field cultivating crops. Indefinite detention is a hallmark of repressive regimes such as Egypt, Libya, and Syria, which currently hold hundreds of individuals in prolonged detention without charge or trial. No other European or North American democracy has resorted to long-term detention without charge outside of the deportation context.⁶⁵

The Obama administration has issued new guidelines for the US detention facility at Bagram Air Base that create an improved system for the detainees held there. It will allow them to be informed of the charges against them, provide them the right to challenge government witnesses, and provide members of the US military the ability to gather classified evidence and question witnesses on behalf of any detainees challenging their detention. The military officials are not lawyers, but they are expected to provide the approximately 650 detainees with better representation before military appointed review boards.⁶⁶

The Obama administration has argued that pursuant to the implied authority extant in the *AUMF*, the president has the legal power to indefinitely, or for a prolonged period, detain alleged or suspected terrorists who are national security threats to the United States. This same argument was proffered by the Bush administration from 2001 to 2008. Additionally, it is concluded that under such circumstances, any legislative enactment

from Congress is unnecessary and unwarranted. This decision not to seek congressional support and explicit authorization to provide for prolonged detention of suspected terrorists creates an opportunity that such an action may not only be repeated but also expanded upon by presidents in the future on the basis of serving our nation's security. It is therefore left to the courts, ultimately the US Supreme Court, to resolve this issue.

Conclusion

In its most recent opinion addressing national security policy as it relates to the legal rights of the Guantanamo detainees, the Supreme Court recognized the fact that terrorism continues to pose a serious threat to the United States and will most probably do so for years to come. The president and Congress, consistent with their constitutional duties and responsibilities, are critical actors in the debate about how best to preserve constitutional values while protecting the nation's security.

When President Bush stood before a joint session of Congress just days after the devastating terrorist attack of 11 September 2001, he declared that our war on terror may begin with al-Qaeda but it does not end there. When he returned to Congress in January to deliver his State of the Union address, he cited HAMAS, Hezbollah, Islamic Jihad, North Korea, Iran, and Iraq in addition to al-Qaeda as the principal sponsors of terrorism and emphasized the need to assert his military powers. The United States was in a state of war against terror, terrorists, and terrorism, which required the president to utilize such tools as indefinite detention, military commissions, enhanced interrogation techniques, and rendition to effectively combat this menace. The criminal justice system—including arrest, indictment, arraignment, extradition, and civilian trials—was inappropriate to address the terror threat.

President Bush compared the war on terrorism to World War II and the Cold War, a global, generation-defining struggle against an enemy of extensive military and ideological power that would transform major portions of the globe. For eight years the Bush administration linked al-Qaeda and the Taliban. There were the terrorists who committed the acts and those who harbored them.

Many of the policies taken by the Bush administration have extensive historical roots and precedence. For example, every wartime president asserted his right to indefinitely detain enemy forces without charge during the period of conflict. Military commissions have been employed since the

earliest days of the republic for prosecution of war criminals. Rendition began under President Clinton and possibly earlier. The responsibility of the executive office to protect national security interests led President Bush to seek to use his full arsenal of tools to fight the war on terror.

The effect of the Bush administration's law-of-war strategy was to distort the legitimacy of practices that had been acceptable in prior wars. As Jack Goldsmith observed, "The early Bush administration failed to grasp what Lincoln and Roosevelt understood well: the vital ongoing need to convince the citizenry that the president is using his extraordinary war powers for the public good and not for personal or institutional aggrandizement. By the time the Bush administration began to act on principle in the second term, it was too late; its credibility on these issues . . . severely damaged . . . was unrecoverable."⁶⁷

Pres. Barack Obama was a major critic of the Bush administration's terrorism policies, including indefinite detention, the use of military commissions, enhanced interrogation techniques, and rendition. He has accepted the position that, legally, we are in a state of war with the organization that attacked the United States on 9/11, al-Qaeda, and our aim is to defeat it, not the vague concept of terror or terrorism, globally.

The Obama administration has essentially accepted the core legal position of the Bush strategy regarding indefinite detention of alleged terrorists at Guantanamo as well as other sites (e.g., Afghanistan). A distinction in the current administration's approach is that it has eliminated the use of the designation "enemy combatant" and narrowed the reach of those who can be detained from persons who "support" al-Qaeda to those who "substantially support" it. Additionally, the administration has insisted that its authority is rooted in the *AUMF* and international laws of war. The president has vowed to work closely with Congress to maintain its support for his actions despite the fact that he believes additional legislative action is not required at this time. President Bush relied upon his Article II authority as commander in chief to unilaterally detain suspected terrorists without congressional or judicial support, or for that matter, international covenants or conventions. President Obama has yet to do so.

Although it appeared that President Obama would discontinue the military commission process as developed in the MCA, the administration has opted to support the 2009 amended version of the law, which is a marked improvement over its predecessor. The president has asserted that commissions will be used in certain cases with the appropriate balance of

prosecutorial judgment and judicial process. There are currently six pending cases of Guantanamo detainees slated for military tribunals.

Both John Yoo and Jack Goldsmith have suggested that President Obama has more in common with the ends of the Bush administration's terrorism policies because he shares Bush's broad view of presidential power. However, it is also clear that there are discernable distinctions between the two presidents' approaches to the legal framework employed in the war against terror.

President Obama has emphasized respect for constitutional values and the need to observe the rule of law, which led to his decision to close the Guantanamo Bay facility. Symbolically, this detainee prison camp had developed a reputation as a legal black hole into which those who were captured in the war on terror were dumped. The president established an aggressive timeline for its closure, created a plan to transfer detainees housed there to a prison complex in northern Illinois, and announced that the United States would try suspects held at Guantanamo in military commissions or civilian courts, depending on the suspect and the allegations. Khalid Shaikh Mohammed and four other high-profile terrorist suspects were selected by Attorney General Eric Holder to be prosecuted in federal court in New York City.

On Christmas Day 2009, a Nigerian national on a flight from Amsterdam to Detroit attempted to blow up the plane and its 278 passengers. This failed terrorist incident immediately precipitated a testy debate as to whether such terrorism suspects in the twenty-first century should be prosecuted in the criminal court system or be treated as enemy combatants under the military commission system of justice.

In this case the incident provided a trail of evidence and there was a single defendant. The defendant voluntarily cooperated with law enforcement authorities and provided usable, actionable intelligence, according to the administration, including who gave him the bomb, where he received it, and where he was trained to use it. The defendant had not been interrogated using enhanced techniques. Under the circumstances, the decision to prosecute the defendant in an Article III court was an appropriate one.

The Bush administration attempted to deal with alleged detained terrorists outside of the civilian legal process. Congress and the Court rejected part of that approach, and it adversely impacted the use of what should have been an acceptable process in time of war, the military commission.

The Obama administration, in contrast, is comfortable that it can effectively use civilian courts as well as military commissions to achieve justice in the successful prosecution of terrorist acts.

The nation should remain on the offensive to protect the American people. The government should continue to bring the world's most dangerous terrorists to justice, and it should do so in the context of the rule of law. Arrest and detention without charge truly offends the Constitution and should never be permitted. Using humiliation and degrading abuse in interrogations is un-American, and seizing citizens of foreign nations and placing them beyond the reach of law is antithetical to the principles of justice that are held so dearly as core values of American society. Human rights guarantees provided in international treaties to which the United States is a signatory, such as the Geneva conventions, as well as customary principles of international law to which we subscribe, must be upheld in word, deed, and spirit.

What may be the most difficult of the many issues raised by the Guantanamo detention experience is the question of what to do with those detainees who cannot be released, transferred to other nations, or prosecuted, either by courts or military commissions. This category of detainee is deeply troubling because it is subject to prolonged if not indefinite detention. How is such a determination made, and what criteria are used to determine that such individuals are too dangerous to be released? Certainly the fact that a person was tortured in detention or was detained on the basis of information extracted from torture cannot be a legitimate basis for prolonged detention, given that such evidence cannot be introduced for purposes of prosecution. How then could it be concluded that persons who could not be prosecuted because they were tortured be detained indefinitely?

The decision by the Obama administration not to seek explicit congressional approval for prolonged or indefinite detention of those held at Guantanamo, others who may currently be in similar circumstances elsewhere, or those alleged terrorists the United States may capture in the future continues the unilateral decision-making strategy that characterized the Bush administration's failed detainee policy. The lack of transparency in the Obama administration's decision-making process concerning this group of detainees raises questions not only about the credibility of the process but also about the accuracy of the conclusion reached that these individuals pose a real threat to our national security interests.

It is significant that, post 9/11, neither the Republican nor Democrat president or Congress have been able to create a legally effective interrogation, detention, and trial system for detainees who are alleged to be unprivileged enemy belligerents. It is clear that an interrogation system based upon indefinite detention has not worked successfully in pursuing our national security interests to date.

President Obama must work directly with Congress to address and respond to detainee policy issues. To do so collaboratively will ensure that adherence for our constitutional values and heritage will not exclusively revolve around the personality of the commander in chief, regardless of who occupies that office. Respect and observance of these constitutional values will preserve the rule of law and ensure deliberative engagement in decision making consistent with American values of fairness and justice. **SSQ**

Notes

1. In the view of Jack Goldsmith, former head of the Office of Legal Counsel in the Department of Justice and assistant attorney general in the Bush administration, the Bush White House had a principled commitment to expanding presidential power that predated 9/11. That commitment led it to act unilaterally on military commissions, detention, and surveillance rather than seeking political and legal support from Congress and opposing judicial review of such policies. Just as damaging was the administration's frequently expressed desire to expand executive power, as Vice President Cheney put it, "to leave the presidency stronger than we found it." Goldsmith, currently a professor at Harvard Law School and a member of the Hoover Institution Task Force on National Security and Law, was forced to resign from his Bush administration position because of his disagreement with national security policy positions established post 9/11. Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W. W. Norton, 2007).
2. "Transcript of President Bush's address," *CNN.com*, 21 September 2001, <http://www.cnn.com/2001/US/09/20/gen.bush.transcript>.
3. *Authorization for Use of Military Force*, Public Law 107-40, 115 Stat. 224, 18 September 2001.
4. *Ibid.*
5. *Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism*, 66 *Federal Register* 57833.
6. John Bellinger III, quoted in Cullen Murphy and Todd S. Purdum, "Farewell to All That: An Oral History of the Bush White House," *Vanity Fair*, no. 582 (February 2009): 99.
7. *Lease of Lands for Coaling and Naval Stations*, 23 February 1903, US–Cuba, US Treaty Series (USTS) 418.
8. *Treaty of Relations between the United States and Cuba*, 29 May 1934, USTS 866, 48 Stat. 1682; and Leonard Cutler, *The Rule of Law and Law of War: Military Commissions and Enemy Combatants Post 9/11* (Lewiston, NY: Edwin Mellen Press, 2005), 36, 51, n. 26–27.
9. Cutler, *Rule of Law*, 51, n. 28.
10. *Geneva Convention Relative to the Protection of Prisoners of War*, 12 August 1949, 6 USTS 3316, 75 USTS 135; and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 USTS 3516, 75 USTS 287.

11. Lawrence Wilkinson, in Murphy and Purdum, "Farewell to All That," 148. In statements he made on the blog *Washington Notes* entitled "Some Truths on Guantanamo Bay," Wilkinson said that authorities were holding innocent civilians as terror suspects for years. He faulted the Bush administration for failing to acknowledge the practice, attributing that failure to a desire to preserve the president's legacy and reputation. *Washington Notes* blog post, 17 March 2009.
12. In his most recent book, John Yoo criticizes the Obama administration for releasing the torture memos, "several of which I worked on," and states that he had to write them because it was his job and the president (Bush) was his client and needed a legal question answered. Yoo believed that the administration's terrorism policies would not be possible were it not for a broad view of presidential power over that of Congress or the court. Yoo was the deputy director of the Office of Legal Counsel in the Justice Department in the Bush administration. See Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan/Simon & Schuster, 2010).
13. Detainee Treatment Act of 2005, H.R. 2863, S. Amdt. 1977, 109th Cong. Title X, 2005.
14. Ibid.; and Presidential Signing Statement, Defense Appropriation Act, December 2005.
15. Military Commissions Act of 2006, Public Law 109-366 (MCA).
16. Army Field Manual 2-22.3, *Human Intelligence Collector Operations*, 6 September 2006.
17. Office of the Vice President, "Interview of the Vice President by Chris Wallace, FOX News," transcript, 19 December 2008, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219-11.html>.
18. "Interview of the Vice President by Jon Ward and John Solomon, *Washington Times*," transcript, 17 December 2008, <http://www.washingtontimes.com/weblogs/potus-notes/2008/Dec/22/cheney-interview-transcript/>.
19. Ibid.
20. Ibid.
21. See Jaclyn Belczyk, "Obama orders Guantanamo prison closed within a year," *Jurist*, 22 January 2009, <http://jurist.law.pitt.edu/paperchase/2009/01/obama-orders-guantanamo-prison-closed.php>.
22. Condoleezza Rice, quoted in Jaime Jansen, "Rice defends Guantanamo detentions at end of UK visit," *Jurist*, 1 April 2006, <http://jurist.law.pitt.edu/paperchase/2006/04/rice-defends-guantanamo-detentions-at.php>. See also Angela Onikepe, "US Dismisses UK Call to Close Guantanamo Bay," *Jurist*, 11 May 2006, http://jurist.law.pitt.edu/paperchase/2006_05_11_indexarch.
23. Barack Obama, *Executive Order 13492—Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, 22 January 2009, §3, 74 *Federal Register* 4897.
24. Safiya Boucaud, "EU member states to consider accepting Guantanamo detainees after screening," *Jurist*, 27 January 2009, <http://jurist.law.pitt.edu/paperchase/2009/01/eu-member-states-to-consider-accepting.php>. States mentioned included France, Germany, Ireland, Portugal, and Spain. The speaker of Italy's Chamber of Deputies, Gianfranco Fini, announced that Italy would not accept detainees released from Guantanamo because Italian law forbids its prison system from housing foreign inmates absent a formal agreement. Lithuania began talks with the United States about accepting prisoners from Guantanamo, and the European parliament voted 542–55 to adapt a resolution calling for member states to accept low-risk prisoners who could not be returned to their home countries because of fear of persecution. See Boucaud, "Italy official says country will not accept Guantanamo detainees," *Jurist*, <http://jurist.law.pitt.edu/paperchase/2009/02/italy-official-says-country-will-not.php>.
25. Obama, *Executive Order 13493*, §4(c)(3).

26. See Leonard Cutler, *Development in National Security Policy since 9/11: The Separate Roles of the President Congress and the United States Supreme Court* (Lewiston: Edwin Mellen Press, 2008), 37–38. In March 2009, Attorney General Eric Holder announced that the Department of Justice was considering accepting into the United States 17 Uighur detainees who were cleared for release. The initial decision to accept the Uighur detainees and settle them in small groups drew strong criticism from politicians, and the Obama administration subsequently revised its commitment to take any Uighurs. Eventually, the United States won an agreement from the government of Palau, one of the world's least-populated nations, located in the Pacific 500 miles east of the Philippines, to accept 13 Uighurs. The president of that country Johnson Toribiong said that they were “honored and proud” to take them in a “humanitarian gesture.” Mark Landler, “Palau to Take Chinese Guantánamo Detainees,” *TimesDaily.com*, 10 June 2009, <http://www.timesdaily.com/article/20090610/ZNYT03/906103011?Title=Palau-to-Take-Chinese-Guant-xE1-namo-Detainees>. However, nine of them expressed reluctance to go there, according to their lawyer Susan Baker Manning. Four remaining Uighurs were accepted and sent to Bermuda, a British territory, and two were accepted as refugees by Switzerland. The Supreme Court in October 2009 agreed to hear the case, *Kiyemba v. Obama*, 08-1234, to determine whether federal courts have the power to order prisoners (Uighurs) held at Guantánamo Bay to be released into the United States. Judge Ricardo Urbina had ruled that “because their detention had already crossed the constitutional threshold into infinitum and because our system of checks and balances is designed to preserve the fundamental right of liberty, the court grants the petitioners motion for release into the United States.” The appeals court ruled that Judge Urbina had overstepped his constitutional authority. See *In re Guantánamo Bay Detainee Litig.* 581 F. Supp. 2d 33 (D.D.C. 2008); and *Kiyemba v. Obama*, 555 F. 3d 1022 (2009).

27. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

28. MCA.

29. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

30. Since *Boumediene* was decided, some 37 habeas petitions have been heard. Thirty have been decided in favor of the detainees, seven against them. Of the 30 ordered released, as of this writing 20 are still in custody. There are 80 detainees who have been approved for resettlement, while about 40 have been referred for prosecution. See Richard Bernstein, “A Detainee Freed, but Not Released,” *New York Times*, 23 September 2009, www.nytimes.com/2009/09/24/us/24iht-letter.html?

31. See, Cutler, *Development in National Security Policy since 9/11*, n. 25 at 83–86.

32. MCA, § 950 p(a).

33. MCA, § 949 d(f)(1)(A).

34. MCA, § 949 a(b)(2)(E).

35. MCA, § 949 d(f)(2)(A).

36. MCA, § 949 d(f)(1).

37. On 18 January 2007, Secretary of Defense Robert Gates released the *Manual for Military Commissions* (MMC), <http://www.defenselink.mil/news/commissionsmanual.html>. See MMC, Rule 701 (f).

38. MCA, § 949 j(d)(1).

39. MCA, § 949 c(b)(3)(D).

40. MCA, § 949 c(a)(5).

41. MCA, § 948 r(b).

42. MMC, Rule of Evidence 304 (b)(3).

43. MMC, Rule 707 (a)(1).

44. MCA, § 950 b.

45. MCA, § 950 f(a).
46. MMC, Rule 1201.
47. MCA, § 950 f(d).
48. MMC, Rule 1201.
49. MCA, § 950 g(a)(1)(B).
50. MCA, § 950 g(d).
51. MCA, § 950 j(b).
52. See Brad Wiegmann and Col Mark Martins, Detention Policy Task Force, to the Attorney General and the Secretary of Defense, memorandum, 20 July 2009, RE: *Preliminary Report*, 3.
53. MCA, § 948, 11, notes 31 and 32.
54. MCA, § 949 a(b)(2)(E), 11, n. 33.
55. MCA, § 948 b(c).
56. MCA, § 950 f(a), 13, n. 48.
57. MCA, § 948 r(b); and MMC Rule of Evidence 304 (b)(3), 12–13, notes 41, 42 .
58. MCA, § 948 b(a).
59. Cutler, Rule of Law, 15.
60. See *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), consolidated as *Al-Marri v. Spagone, Commander, U.S.N., Consolidated Naval Brig*, No. 08-368, July 2008.
61. Department of Justice Press Release, “Ali al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaida,” 30 April 2009, <http://www.usdoj.gov/opa/pr/2009/April/09-nsd-415.html>; and David Mercer, “Judge in Illinois sentences al-Qaida agent more than eight years in prison because of harsh treatment,” 29 October 2009, www.ilcd.uscourts.gov/media.
62. Seth G. Jones and Martin C. Libicki, *How Terrorist Groups End; Lessons for countering Al Qaida*, MG-741-RC (Santa Monica: RAND, 2008).
63. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), n.28.
64. In a recent ruling, the US Court of Appeals for the District of Columbia Circuit held that “the president has broad authority to detain suspected terrorists,” finding that the detention of Yemeni Ghaleb Nassar Al-Bihani was authorized under domestic law. The three-judge panel of the DC Circuit found that “Al-Bihani was both a part of and substantially supported enemy forces.” The court also found that the scope of the president’s detention authority is not constrained by international law and the government’s burden of proof in habeas proceedings is only a preponderance of the evidence standard. The case was appealed, which could result in a rehearing by the full appeals court. Jaclyn Belczyk, “DC Circuit upholds broad presidential authority to detain terrorism suspects,” *Jurist*, 5 January 2010, <http://jurist.law.pitt.edu/paperchase/2010/01/dc-circuit-upholds-broad-presidential.php>.
65. Sarah Cleveland, “The Legal, Moral, and National Security Consequences of ‘Prolonged Detention’,” *Hearings before the Senate Committee on the Judiciary, Subcommittee on the Constitution*, 9 June 2009, 4, <http://judiciary.senate.gov/hearings/hearing.cfm?id=3896>.
66. The new Bagram Air Base facility, which has room for 1,400 detainees, has opened and is part of the administration’s wider effort to improve the Afghan detainee system and will be controlled by the Afghan government in the near future. See Patrice Collins, “Obama administration to open new Bagram detention facility,” *Jurist*, 16 November 2009, <http://jurist.law.pitt.edu/paperchase/2009/11/obama-adminstration-to-open-new-bagram.php>.
67. Jack Goldsmith, “The Cheney Fallacy,” *New Republic*, 18 May 2009, <http://www.tnr.com/article/politics/the-cheney-fallacy?id=1e733cac-c273-48e5-9140-80443ed1f5e2&p=1>.